

Can market access be taken seriously?

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In recent years, the doctrinal focus in the area of free movement of goods has undoubtedly been on market access.¹ As such, market access has been the touchstone of measures having equivalent effect since *Dassonville*.² The main reason why the judgments in the *Commission v. Italy* (trailers)³ and *Mickelsson and Roos*⁴ cases have prompted such lively discussions is because the Court introduced a new synthetic formula,⁵ which could be read as both a reaffirmation of existing law and/or as the

¹ C. BARNARD, “Fitting the remaining pieces into the goods and persons jigsaw?”, *E.L. Rev.* 2001, 26(1), 35-59; P. OLIVER and W.-H. ROTH, “The Internal Market and the Four Freedoms”, *CML Rev* 2004, 407; L. PRETE, “Of Motorcycle Trailers and Personal Watercrafts : the Battle over *Keck*”, *LIEI*, 2008, 35(2), 133-155; A. RIGAUX, “Cohérence et marché intérieur”, in V. MICHEL (ed.), *Le droit, les institutions et les politiques de l’Union européenne face à l’impératif de cohérence*, Presses universitaires de Strasbourg 2009; E. SPAVENTA, “Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v. Italy* and *Mickelsson and Roos*”, *E. L. Rev.* 2009, 34(6), 914; P. PECHO, “Good Bye *Keck*, A comment on the Remarkable Judgment in *Commission v. Italy*, C-110/05”, *LIEI*, 2009, 36(3), 257-272; T. HORSLEY, “Anyone for *Keck*?”, *CML Rev.* 2009, 2001-2019; J. SNELL, “The Notion of Market Access : A Concept or a Slogan?”, *CML Rev.* 2010, 437-472; I. LIANOS, “Shifting Narratives in the European Internal Market : Efficient Restrictions of Trade and the Nature of ‘Economic’ Integration”, *European Business Law Review*, 2010, 705-760 ; A. TRYFONIDOU, “Further steps on the road to convergence among the market freedoms”, *E.L. Rev.* 2010, 35(1) 36 at 50; C. PRIETO, “Entrave et accès au marché” in L. AZOULAI (ed.), *L’entrave dans le droit du marché intérieur*, Bruylant, 2011, 73-95; P. CARO DE SOUSA, “Through contact lenses, darkly : is identifying restrictions to free movement harder than meets the eye? – Comment on *Ker-Optika*”, *E.L. Rev.* 2012, 37(1), 79-89.

² Case 8/74, *Dassonville* [1974] ECR 837, § 5, holding that “all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions”.

³ Case C-110/05, *Commission v. Italy*, [2009] ECR I-519.

⁴ Case C-142/05, *Mickelsson and Roos*, [2009] ECR I-4273.

⁵ *Commission v. Italy*, cited at footnote 3, § 37 : “measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favourably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article 28 EC, as are the measures referred to in paragraph 35 of the present judgment [*Cassis*-type measures]. Any other measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept” (emphasis added).

consecration of a “pure” market access test.⁶ Indeed, immediately after *Commission v. Italy* and *Mickelsson and Roos*, it was not clear whether Keck was still good law.⁷ Some commentators considered that the Court had embraced a pure market access test, in which the Keck distinction seemed of little relevance.⁸ Others considered that the reformulation of the Court’s case law did not amount to a change of approach and that discrimination remained the first criterion to characterise a measure having equivalent effect (MEE).⁹ The discussion was prolonged after the Court explicitly relied again on *Keck* in *Ker-Optika*.¹⁰

In this contribution, I do not attempt to offer yet another clarification of the legal test for measures having equivalent effect to quantitative restrictions. Rather, I take as a starting point the uncontroversial idea that hindrance to market access is at least a – if not *the* – legal criterion to establish a *prima facie* violation of article 34 TFEU (leaving aside here the issues of justifications and proportionality). This prompts the question of what is needed to establish hindrance to market access to the requisite legal standard. In this regard, a striking feature of the case law is that the Court has developed many techniques, which help circumvent this issue. Section 1 reviews them, taking examples from free movement of goods cases only, although it seems that the argument could translate to other freedoms. Despite the flourish of evidence-avoiding techniques developed by the Court, it is submitted that, if market access is to be taken seriously as a legal criterion – and not only as a goal or as a justification¹¹ – evidentiary issues will have to be dealt with. In order to determine how an impediment to market access would need to be proven in difficult cases, it would be useful to be able to rely on an analytical framework. Yet, legal scholars have so far only been in a position to acknowledge that there was none. Section 2 examines whether economics and/or behavioural sciences could become sources of inspiration to develop one.

⁶ A. TRYFONIDOU, cited at footnote 1, *e.g.* at 41. The expression is used to stress the departure from the discrimination-based approach prevalent in *Keck*.

⁷ Uncertainty was caused by the fact that, although *Keck* was cited at § 34 of *Commission v. Italy* (cited at footnote 3), it seemed to be sidestepped by the test outlined in § 35. The fact that *Keck* was not cited in *Mickelsson* (cited at footnote 4) added to the impression that *Keck* might be no more than a *lieu de mémoire* of Union law. Yet, in Case C-108/09, *Ker-Optika*, [2010] ECR I-12213, the Court relied on *Keck* to rule on the lawfulness of a ban of online selling of contact lenses. See § 51 *sq.*

⁸ See *e.g.* E. SPAVENTA, cited at footnote 1, at 914; A. TRYFONIDOU, cited at footnote 1, at 50. P. PECHO, cited at footnote 1, 262; T. HORSLEY, cited at footnote 1, at 2009.

⁹ P. WENNERAS and K. BOE MOEN, “Selling arrangements, keeping *Keck*”, *E.L. Rev.* 2010, 35(3) 387. The authors acknowledge that the distinction between measures regarding selling arrangements and other measures is no longer relevant under article 34 TFEU (at 393).

¹⁰ Case C-108/09, *Ker-Optika*, cited at footnote 7.

¹¹ As in Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097, § 17 (quoted footnote 14 below).

I. – Hindrance to market access and how to avoid proving it

Impediment to market access is a sufficient criterion for establishing a *prima facie* violation of article 34 TFEU as the Court emphasised in *Commission v. Italy* (trailers), holding that : “[a]ny [...] measure which hinders access of products originating in other Member States to the market of a Member State is also covered by that concept [measures having equivalent effect to quantitative restrictions]”.¹² Yet, it is not necessary in all cases to establish that market access is in fact impeded. Indeed, the Court appears to try and spare to spare litigants the task of adducing potentially complex and costly economic evidence on this point – and, by the same token, to spare courts the trouble of reviewing it.

No less than four different legal techniques seem to serve this function. First of all, the Court has always accepted and actively endorsed an abstract type of appraisal of national measures. Second, as is well known, the Court has consistently declined to set a threshold for significant impediment to cross-border trade. Third, presumptions are used to infer effect from other characteristics of national rules, in particular their discriminatory nature. This may be reinforced – fourth and last – by the adoption of the object/effect alternative.

A. – ABSTRACT APPROACH

The abstract approach to measures having equivalent effect goes back to the very early cases. It is apparent in the language of *Dassonville* : “all trading rules enacted by Member States which are *capable of hindering*, directly or indirectly, *actually or potentially*, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions”.¹³ It culminated in *Keck*, where the Court held that “the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements *is not such* as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as [they are non discriminatory in law and in fact]”. In this passage, abstraction borders on legal fiction. Indeed, the language of *Keck*, referring to the “nature” of measures¹⁴ seemed to suggest an irreversible presumption, *i.e.* a rule applicable as a matter of law, as opposed to a genuine – *i.e.* rebuttable – presumption.

¹² Opinion of AG Bot in *Commission v. Italy*, cited at footnote 3, § 35

¹³ Cited at footnote 2, § 5.

¹⁴ § 17 : “Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not *by nature* such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty” (emphasis added).

Therefore, if paragraph 17 of the *Keck* judgment is to be taken literally, it precludes parties from adducing evidence that a non-discriminatory measure relating to certain selling arrangements hinders cross-border trade. Effects of such measures are considered a matter of law and not a matter of fact.

This legal fiction was famously and convincingly exposed by AG Jacobs in his Opinion in *Leclerc-Siplec*, in relation to a ban on television advertisements.¹⁵ Subsequently, the Court did not reverse *Keck* but did relax its dogmatic approach to the “nature” of rules by introducing a small but significant semantic variation in *Gourmet*.¹⁶ It held that “if national provisions restricting or prohibiting certain selling arrangements are to avoid being caught by Article [34] of the Treaty, they *must not be of such a kind* as to prevent access to the market”,¹⁷ thus indicating that the effect of a national measure on market access was a matter of fact, even for measures which had as their object the regulation of certain selling arrangements. This shift towards a more realistic approach was welcome but did not signal a complete departure from the abstract approach. Rather, it curbed the excesses of abstraction as if to restore some acceptability of a still very abstract appraisal of measures having equivalent effect. What I call abstraction, in this context, relates to the manner in which the Court approaches the distinction between fact and law. As Sir Francis Jacobs once put it, any decent lawyer is capable of framing a question of fact as a question of law.¹⁸ *A fortiori*, members of the Court excel in this art. The abstract approach is a product of this mastery. It consists in extending the scope of law as far as is reasonably practicable, to the detriment of issues of fact.

Such an approach is appealing to the Court and to Member States for at least two reasons. First, it has the advantage that limitations inherent to the preliminary ruling procedure do not bear so much as they would under a more fact-based approach. So long as evidence is not of significant importance, the Court is in a position to decide in a large number of cases whether a national measure violates article 34 TFEU, which fosters uniformity across the EU. Indeed, if more cases had to be decided on the facts the system would become more decentralised, thus increasing the risk of diverging appraisals for similar measures. A centralised system also provides greater legal certainty to Member States, who do not have to wait for final adjudication by national courts or monitor 26 (and counting) other national sets of case law. Second, an abstract approach avoids putting a heavy evidential burden on parties to article 34-litigation, *i.e.* both economic operators and Member States. In actions brought against Member States for failure to fulfil their obligations, where the Court has full jurisdiction, it also

¹⁵ Opinion in Case C-412/93, *Leclerc-Siplec v. TFI and M6* [1995] ECR I-179 § 38 *sq.*

¹⁶ Case C-405/98, *Gourmet*, [2001] ECR I-1795.

¹⁷ *Gourmet*, cited footnote 16, § 18.

¹⁸ F. JACOBS, “Proposals for Reform in the Organisation and Procedure of the Court of Justice of the European Communities”, in *Liber Amicorum Pierre Pescatore*, Nomos Verlag, 1987, at 295.

saves the Court itself time and energy, as it is not required to review extensive economic evidence relating to how trade is affected by the measure at stake. AG Bot stressed this point in his Opinion in *Commission v. Italy*, arguing that, where effect had to be analysed, “the analysis to be carried out by the Court should not involve any complex economic assessment”.¹⁹ Member States are keen that national courts should enjoy the same benefits of abstraction, as was explained by the Kingdom of the Netherlands in the same case. One of the advantages of the *Keck* approach, it argued, was that it allowed national courts to apply article 34 TFEU in a “reasonably abstract” manner.²⁰

It thus appears that the abstract approach to measures having equivalent effect may be an element of institutional equilibrium. The fact that the issue of standard of proof was never raised in article 34-litigation would seem to suggest that the current, implicit and very low standard suits both the Court and Member States well. This attitude on the part of the Court is consistent with its general cautiousness vis-à-vis expert evidence, which is by no means unique to free movement of goods.²¹ Even in competition law, where the standard of proof is arguably higher, there is a clear reluctance on the part of the Court to engage in quantitative effects-based approach.²²

B. — NO *DE MINIMIS* THRESHOLD

The abstract approach just described is necessarily qualitative. It is therefore consistent that the Court has always declined to adopt a *de minimis* rule,²³ despite calls to reverse this position, notably by AG Van Gerven in *Torfaen*²⁴ and AG Jacobs in *Leclerc-*

¹⁹ Opinion in *Commission v. Italy*, cited at footnote 3, § 116. See also Opinion of AG Stix-Hackl in Case C-322/01, *Deutscher Apothekerverband*, [2003] ECR I-14887, § 81.

²⁰ *Commission v. Italy*, cited at note 3, at 31.

²¹ É. BARBIER DE LA SERRE and A.-L. SIBONY, “Expert Evidence Before the EC Courts”, *CML Rev.* 2008, vol. 45, 941-985.

²² Note that, in the area of competition law too, the Court has shown a great ability to resist the doctrinal push towards a more effects-based approach. See e.g. Case C-95/04 P, *British Airways*, [2007] ECR I-2331, § 68, where the Court uses the phrase “capable of” to dismiss the claim that, under article 102 TFEU, exclusionary effects need to be proven. In its recent judgment in Case C-209/10, *Post Danmark*, NYR, the Court seems, however, to embrace a more effects-based approach (§ 22, giving general relevance to the as-efficient competitor test). As this is a preliminary ruling, it remains to be seen how EU courts will implement this approach in annulment actions, where evidence will need to be reviewed by the General Court, under the supervision of the Court. It should also be noted that the as-efficient-competitor test does not involve measuring the magnitude of actual exclusionary effect. Rather, it is a way of *reasoning* on the existence of such an effect.

²³ Joined Cases C-177 and 178/82 *van de Haar* [1984] ECR 17987, § 13; Opinion of AG Jacobs in case C-383/01, *Bilimportörer* [2003] ECR I-6065, § 29 and references cited. AG Fennelly, in his opinion in Case C-217/99, *Commission v. Belgium* (§ 32) also relies on Case C-67/97 *Bluhme* [1998] ECR I-8033, § 20 (restrictions affecting only a small part of the territory of the Kingdom of Denmark). See further, P. OLIVER, *Free movement of goods in the European Union*, Hart Publishing, 5th ed., 2010, § 6.17 at 91.

²⁴ Case 145/88, *Torfaen* [1989] ECR 3851.

Siplec.²⁵ The Court has found a functional substitute to a *de minimis* rule, by holding that, where the link between the measure and any restriction to trade is “too uncertain and indirect”²⁶ or “too random and indirect”²⁷, article 34 TFEU is not applicable.²⁸ This criterion rests on an appraisal of causality and not on quantity (volume of forgone intra EU-trade). For this reason, it sits better with the chosen abstract approach. A *de minimis* test would not only be difficult to delineate and apply,²⁹ it would also introduce a different, more fact-based, logic.

C. — CATEGORISATION

Another judicial technique, which has reinforced the abstract approach and allowed the Court to preserve article 34-litigation from intensive factual review is the categorisation of MEEs coupled with presumption-like rules. The Court has singled out certain categories of measures and deemed them equivalent to quantitative restrictions. This holds true for discriminatory measures and measures relating to product requirements. Technically, the rules laid down by the Court regarding these two types of measures are not presumptions, yet they serve the very same function, namely that of analytical and evidentiary shortcuts.

There are two reasons why rules relating to discriminatory measures and to product requirement cannot be considered as presumptions in a technical sense. First, a true presumption is rebuttable³⁰ and it does not seem to be the case that either a discriminatory measure or a product requirement could be saved by proving they do not, in fact, hinder market access. Second, the rules laid down by the Court regarding each of these two categories of measure are not formulated as presumptions. Although the wording in *Cassis de Dijon* is somewhat contorted, the Court appears to be ruling on the substan-

²⁵ Cited at footnote 15 above, § 42 *sq.* A few years later, AG Jacobs had not lost hope and noted in his opinion in Case C-379/98, *PreussenElektra* [2001] ECR I-2099, § 204, that “Under the Court’s current case-law it is not clear whether there is a *de minimis* rule in relation to Article [34] of the Treaty, excluding from the scope of Article [34] of the Treaty all measures lacking an appreciable effect on trade”. Similarly, in his opinion in Case C-12/00, *Schmidberger* [2003] ECR I-5659, § 67, AG Jacobs writes “If a *de minimis* rule exists, ...”. In contrast, AG Fennelly, at the same point in time, was of the opinion that “internal market measures are not subject to a *de minimis* test” (Opinion in Case C-376/98 [2000] ECR I-8419, § 204).

²⁶ Case C-379/92, *Peralta* [1994] ECR I-3453 and case law cited. See also cases cited by AG Jacobs in his Opinion in *Schmidberger* (cited at footnote 25 above), footnote 26 and P. PECHO, cited at footnote 1, at 258.

²⁷ See, e.g. Case C-254/98, *TK-Heimdienst* [2000] ECR I-151, § 30 (*a contrario*).

²⁸ L. Prete lists yet more semantic variations. L. PRETE, cited footnote 1, at 151.

²⁹ As recognised, e.g. by the Kingdom of Netherlands in *Commission v. Italy* (trailers), see Opinion of AG Bot, cited at footnote 3, § 37. See also SNELL, cited at footnote 1, 159 and footnote 113.

³⁰ A conclusive or irrebuttable presumption is in reality a substantive rule. See e.g. *Barron’s dictionary of Legal Terms*, 4th ed., 2008.

tive issue of compatibility of product requirements with article 34 TFEU.³¹ Similarly, the prohibition on discriminatory measures is a substantive one. Indeed, the distinction between discriminatory and non-discriminatory measures governs, in principle, the availability of the mandatory requirement defence.³² In this respect, the discrimination criterion appears to be a substantive one : the applicable rule depends on whether it is satisfied or not. In other words, discrimination is a nod in the decision tree followed by the Court.³³ Furthermore, in relation to certain selling arrangement the two non-discrimination conditions laid down in *Keck* also appear as substantive criteria.³⁴ The same characterisation applies to the distinction between measures relating to product requirement and certain selling arrangements, as the distinction made in *Keck* governs the applicable legal test.³⁵

Yet, it is useful to think of the judge-made rules relating to discriminatory measures and to product requirement rules as “conclusive presumptions”, “absolute presumptions”³⁶ or “evidence-suppressing rules”,³⁷ rather than as autonomous substantive rules.³⁸ This is because it helps clarify the meaning of paragraph 37 of the *Italian Trailers* judgment, where the Court sums up its case-law in – apparently – distinguishing three situations : discriminatory measures, *Cassis*-type measures (product requirement in the absence of harmonisation) and “any other measure which hinders access of products originating in other Member States to the market of a Member State”. The first question which came to mind when I first read this paragraph was “why did the Court present a tripartite classification of MEEs when the second category is obviously a sub-

³¹ Case 120/78, *Rewe v. Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”), [1979] ECR 649. The relevant passage in § 8 reads as follows : “Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question *must be accepted* [as compatible with article 34 TFEU] in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer”. Emphasis added.

³² See e.g. C. BARNARD, *The Substantive Law of the EU : the Four Freedoms*, OUP, 2nd ed. 2007 at 115. This principle is however increasingly criticised. See e.g. L. PRETE, cited at footnote 1, 152 sq; P. PECHO, cited at footnote 1, at 267 sq; M. FALLON and D. MARTIN, “Dessine-moi une discrimination...”, *J.D.E.*, 2010, n° 170, 165-173 at 166.

³³ See e.g. C. BARNARD, *Four Freedoms*, cited at footnote 32, figure 6.2 at 125.

³⁴ Cases C-267/91 and C-268/91, *Keck and Mithouard*, [1993] ECR I-6097, § 17 : “Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products”.

³⁵ See e.g. C. BARNARD, *Four Freedoms*, cited at footnote 32 above, figure 7.2 at 153.

³⁶ E. SPAVENTA (cited at footnote 1), at 921.

³⁷ I. LIANOS, cited at footnote 1, at 732.

³⁸ The same idea is expressed by Luca Prete (cited at footnote 1, at 149), who notes that “the Court has identified ‘categories’ of measures which can be judged as capable of hindering market access without requiring any in-depth factual or economic assessment of the measure at issues”.

set of the third”? Reading the first two elements as presumptions and the third as a substantive criterion helps solve this puzzle. In this perspective, market access is the sole substantive criterion and both discriminatory measures (whatever their object) and measures relating to product requirement (in the absence of harmonisation) are deemed restrictive of market access in all circumstances.³⁹ In this sense, *per se* prohibition of discriminatory rules and the *Cassis* test are substantive rules which, in the general economy of a market access test, play the same role as presumptions, in that they allow a case to be decided without applying the open-ended *Dassonville* definition. The evidentiary requirement is thus not only limited in intensity – by the abstract approach described above – it is also reduced in scope through categorising some measures as *per se* restrictive of intra-EU trade.

D. – THE OBJECT/EFFECT ALTERNATIVE

The object/effect alternative is a familiar one in competition law. It is found in the text of article 101 TFEU, which prohibits “agreements between undertakings [...] which have as their object or effect the prevention, restriction or distortion of competition”. In *Consten and Grundig*, the Court clarified that “or” had indeed a fully disjunctive value : if an agreement has the object of restricting competition, there is no need to look into its effect.⁴⁰ In this context, the object/effect alternative has the effect of removing a considerable evidentiary burden for parties to article 101-litigation in a subset of ‘easy’ cases.⁴¹

The import of the phrase “object of effect” in article 34 TFEU case law is quite new. Before *Commission v. Italy*, it was only part of the formula used by the Court in article 35 TFEU cases, according to which only “measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade” were covered by this provision.⁴² In paragraph 37 of *Commission v. Italy* the Court indicated that “measures adopted by a Member State the *object or effect* of which is to treat

³⁹ I am deliberately using the wording of the directive on unfair practices, as I think the type of reasoning is similar : situations are identified where the open-ended general definition (of article 5 as well as article 6-9 of the directive) need not be applied. Directive 2005/29/EC concerning unfair business-to-consumer commercial practices O.J. L 149, 11 June 2005, 22-39, recital 17 and annex I. L. PRETE (cited at footnote 1, at 152) deals with the same issue in different terms but I think his analysis goes in the same direction. He writes that, for discriminatory measures and un-harmonised product requirements, “the effect of hindrance is *in re ipsa*”.

⁴⁰ Joined cases 56 and 58-64, *Consten and Grundig* [1966] ECR 429 at 342.

⁴¹ In the context of article 101, the object/effect distinction also serves as an indicator of the seriousness of the violation. An analogy with article 34 is made in this regard by M. FALLON and D. MARTIN, cited at footnote 32 above, at 169. See also M. FALLON and D. GÉRARD in this volume.

⁴² Case 15/79 *Groenveld* [1979] ECR 3409, § 7, emphasis added.

products coming from other Member States less favourably are to be regarded as measures having equivalent effect". This wording, which was repeated in subsequent cases,⁴³ differs from the *Groenveld* formula in that the object or effect is not characterised as "specific". It is not clear how significant this variation is, but, if it has any significance, it probably means that it is not necessary under article 34 TFEU that a national measure has as its sole aim to discriminate against imports in order to consider it *per se* prohibited. Similarly the discriminatory effect does not need to be the only effect of the measure for it to be categorised as unlawful under article 34 TFEU. "Simple" – as opposed to "specific" object or effect would be enough to trigger the conclusive presumption according to which the discriminatory measure is a MEE, calling for a justification.⁴⁴

It is not entirely clear whether, in the context of MEEs, the object/effect alternative will function in exactly the same way as under article 101 TFEU, *i.e.* as an evidentiary shortcut. This is because the two argumentative contexts differ. In relation with the particular issue under discussion, the analytical framework under article 101 TFEU is simpler than under article 34 TFEU. The substantive rule contained in article 101 TFEU refers directly to "object of effect". It is therefore self-evident that proving anti-competitive object is sufficient for triggering the application of article 101, paragraph 1, TFEU. The Court clarified this point in *Consten and Grundig*, though it hardly needed to. Under article 34 TFEU, however, if we accept the above analysis and that of many commentators, the substantive criterion is the restriction of market access. The Court has not ruled that article 34 TFEU prohibits measures "having as their object or effect the restriction of market access". If it had, the parallel with article 101 TFEU would have been complete. Rather, the Court ruled that measures having as their object or effect discrimination against products from other Member States violate article 34 TFEU. The extra step, which has no equivalent in the context of article 101 TFEU, is reconciling the object/effect alternative, which relates to discrimination, with the market access test. The relationship between market access and discrimination is the topic of many profound reflections in EU law, which cannot be accounted for here.⁴⁵ My point is only that the evidentiary shortcut value of the object/effect distinction introduced in article 34-case law depends on how one connects discrimination and market access, and this is not an easy connection.

⁴³ See *e.g.* Case C-456/10, *ANETT*, NYR, § 34 and 36; Case C-108/09, *Ker-Optika*, cited at footnote 7, § 49.

⁴⁴ For a different view, see M. FALLON and D. MARTIN, cited at footnote 32 above. The authors argue in favour of the following test : 1) is there an impediment to trade? 2) if so, is there a discrimination (direct or indirect)?; 3) if there is not, there is *prima facie* no violation of article 34 unless 4a) the claimant can demonstrate the measure is disproportionate; if however there is a discrimination, there is a *prima facie* violation of article 34 and it is 4b) for the State to justify that it is justified and proportionate.

⁴⁵ On this question, see M. FALLON and D. MARTIN, cited at footnote 32 above; PRETE, cited at footnote 1, at 145; SNELL, cited at footnote 1, at 467.

In his Opinion in *Alfa Vita*, AG Poiares Maduro explained that a standard common to all freedoms of movement and citizenship rights emerged from the case law of the Court, namely that of “discrimination against the exercise of freedom of movement”.⁴⁶ This reading – which was not endorsed at the time by the Court, but which may gain ground in the post *Commission v. Italy* era – connects discrimination and market access very closely. Discrimination is more than a proxy for market access; market access is conceptually analysed as the result of various types of discrimination, so that proving a discriminatory effect is proving impediment to market access. If this conceptualisation is adopted, the analogy with article 101 TFEU can be pushed further. There is no longer a formal dissimilarity between, on the one hand, the situation under article 34 TFEU, characterised by two distinct elements, namely i) “object of effect of restricting A”⁴⁷ and ii) “restricting access to B”⁴⁸ and, on the other hand, the situation under article 101 TFEU, characterised by only one element, namely “object or effect of restricting C”.⁴⁹ Even if the Court does not endorse the theory put forward by AG Poiares Maduro, it could – and should⁵⁰ – find other ways to clarify the relationship between discrimination and market access. An ancillary effect of this clarification would be to help determine the added value of using the phrase “object or effect” in the new *Commission v. Italy* formula.

To the extent that discrimination is thought to be indicative of impediment to market access and to the extent it is easier to prove discrimination than market access – which seems quite clear for discriminatory object but much less so for discriminatory effect – the object/effect distinction could play in article 34 TFEU a role analogous to the one it has as under article 101 TFEU, *i.e.* as (yet) another means to avoid complex proof of effect on intra EU-trade in a subset of cases.

Among the four techniques reviewed, some are more apt than others when it comes to avoiding factual appraisal of the effect of a national measure on intra-EU trade. The commitment to abstraction is very potent to keep evidence relating to trade patterns away from the courtroom. The absence of the *de minimis* threshold ensures internal consistency with the abstract approach and works as a safety mechanism to prevent quantitative evidence from resurfacing in article 34-litigation. The categorisation of measures allows several frequent types of measures to be deemed restrictive in all circumstances, thus creating large categories of “easy” cases – at least as far as *prima facie*

⁴⁶ Opinion of AG Poiares Maduro in Cases C-158/04 and C-159/04, *Alfa Vita Vassilopoulos* [2006] ECR I-8135, § 42 to 46.

⁴⁷ Where A could be equality, if one agrees that discrimination is a form of restriction of equality, which is, arguably, another complex question. See M. FALLON and D. MARTIN, cited at footnote 32.

⁴⁸ Where B is market access.

⁴⁹ Where C stands for competition.

⁵⁰ As M. FALLON and D. MARTIN, cited at footnote 32, have forcefully argued.

violation of article 34 TFEU is concerned, as the proportionality review is not simplified in the same manner. Finally the object/effect alternative could be an additional technique used to further restrict the number of cases where the effect of a measure on market access has to be appraised, but this is more tentative and subject to unresolved questions.

After this review of techniques developed by the Court to shield article 34-litigation from facts, the question remains: in the residual cases not covered by these techniques, how could and should restrictions to market access be established?

II. – Hindrance to market access: how could it be proven?

In an oft-cited passage of *Deutscher Apothekerverband*, the Court insisted that “[e]ven if a measure is not intended to regulate trade in goods between Member States, *the determining factor is its effect*, actual or potential, on intra-Community trade”.⁵¹ If effect is really determining, the Court should have an analytical framework to appraise it, even if it has successfully developed an array of techniques to avoid doing so. As several commentators have noted, there is, at present, no such framework: “the problem with the use of the ‘market access’ concept”, notes one commentator, “is that it remains unclear what the term actually means”;⁵² “it is not yet clear what exactly should be understood under the concept of market access” remarks another.⁵³ “One should query what market access really means”, recommends a third one,⁵⁴ observing that “so far, the concept has been used in an intuitive way”.⁵⁵ A more radical view is that “market access obscures rather than illuminates”⁵⁶ so that “the term should be abandoned as an unhelpful slogan”.⁵⁷

It emerges from such comments that the notion of market access poses a challenge. In this section, I do not attempt to offer a neat conceptualisation of market access. I would like to go through a short prospective inventory of what external resources scholars, litigators, Advocate generals and the Court itself could conceivably draw on as they will try to refine the notion of market access. By external resources, I mean insights from disciplines other than law. Economics is the first source of inspiration that comes to mind, possibly because the word “market” is associated with that discipline and also because market access is a consideration in competition law, an area in which

⁵¹ Case C-322/01, *Deutscher Apothekerverband* [2003] ECR I-14887, § 67.

⁵² T. HORSLEY, cited at footnote 1, at 2014.

⁵³ PECHO, cited at footnote 1, at 264.

⁵⁴ E. SPAVENTA, cited at footnote 1, at 923.

⁵⁵ *Ibidem*.

⁵⁶ SNELL, cited at footnote 1, at 470.

⁵⁷ *Ibidem*, at 471.

economics has been increasingly invited over the past decades. Economics is not, however, the only available source of wisdom. Given that the Court, both in *Commission v. Italy* and in *Mickelsson and Roos* stresses the role of consumers' reaction to the national measures, it seems to open a door to enquiries into how people react to norms, an area at the crossroads of several behavioural sciences such as sociology, psychology, and behavioural economics.

Before turning to science for inspiration, it is worth making a general remark. Borrowing ideas from science does not necessarily mean inviting complex scientific evidence in procedures before national courts or before the Court. As I have shown elsewhere, in the context of economic imports in competition law, borrowing scientific notions or distinctions does not necessarily entail an increase in the level of technicality of evidence.⁵⁸ This may be illustrated by an example relating to predation, a form of abuse of a dominant position. Economists have distinguished three types of predation, each associated with a specific strategy of the dominant firm.⁵⁹ For each type of predation, it was then possible to highlight key factors for the predatory strategy to be worth engaging into (from the perspective of the predator). This could easily translate as relevant facts that a competition authority or court can look at when adjudicating a case of predation. For one of the types of predation (financial predation), a key element is the sensitivity of the alleged prey's financing to its short-term profits.⁶⁰ This is not a fact that necessitates complex statistical evidence. It only requires an enquiry into whether the firm in question depends on external creditors and whether these creditors, *e.g.* banks, are putting pressure for short-term profitability. What is borrowed from economics in this example (and many others) is a *statement of relevance*. Economists draw the attention of lawyers to the relevance of a certain fact, which has not, so far, been held legally relevant. Whether this fact is easy or hard to prove does not depend on the circumstance that economists (or other scientists for that matter) highlighted its relevance. When the dialogue between law and science turns on issues of relevance, it helps build legal tests. It operates at the level of interpretation and, although of course, it has a bearing on what sort of evidence will need to be adduced when the new legal test is applied, conceptual clarification should not be equated with a complication of evidence. Given the obvious reluctance of the Court to interpret the law in a way that would require complex evidence, this is an important point to bear in mind.

⁵⁸ A.-L. SIBONY, *Le juge et le raisonnement économique en droit de la concurrence*, LGDJ, Paris, 2008, 611 *sq.*

⁵⁹ EAGCP report to the Commission, An economic approach to Article 82, available at <http://ec.europa.eu/competition/antitrust/art82/index.html> at 20, distinguishing between "reputation, signal jamming and financial predation".

⁶⁰ EAGCP report, cited at footnote 59, at 21.

A. — CAN ECONOMIC ANALYSIS HELP?

At first sight, economics might seem relevant with regard to the notion of market access. If economics offered a satisfactory conceptualisation of barriers to entry, hindrance to market access could be equated with that notion and benefit from the insights of economic theory. Unfortunately, this is not the case, for both normative and analytical reasons.

The normative issue behind the search for a broad or narrow definition of market access is nothing less than that of the goal of EU integration.⁶¹ The choice is between the minimal and consensual goal of protecting traders from overt or covert protectionism and a more radical and a less-than consensual deregulatory aim : in the words of AG Tizzano, “prohibiting rules as a matter of principle” in order to maximise intra-EU trade.⁶² The economic notion of barriers to entry cannot help with the choice between these two conceptions, nor should it be made look like it could help, since this choice is fundamentally political. In fact, a similar political choice is reflected in a classic controversy among economists about the definition of barriers to entry. As Ioanis Lianos has shown, the broad definition of barriers to entry, by Joseph Bain⁶³ and the narrow definition proposed by George Stigler⁶⁴ differ in the same way as competing interpretations of the market access criterion does.⁶⁵ For the sake of clarity, I will transpose the discussion to the familiar factual setting of the *Cassis de Dijon* case. Bain’s definition of barriers would entail comparing the situation of French Cassis producers to that of German liquor producers. The relevant question, according to Bain, is whether entrants (French producers) could achieve the same level of profitability in the German market as the local producers. If the answer to this question is in the negative, there are barriers to entry. In this broad definition, anything that makes importers worse off than local producers qualifies as a barrier to entry. In this sense, it is very close to the *Dassonville* standard. Stigler’s definition is deliberately more restrictive : he considers that the right question to ask is whether entrants (French Cassis producers) face costs to enter the German market, that local producers (German liquor producers) did not have to face when they started their business.

It is noteworthy that both definitions are based on a comparison between the situation of cross-border operators and that of local producers, which, in legal terms, could

⁶¹ See J. SNELL, cited at footnote 1, spec. at 449; I. LIANOS, cited at footnote 1.

⁶² Opinion in Case C-442/02, *CaixaBank* [2004] ECR I-8961, § 63.

⁶³ J. BAIN, *Barriers to New Competition*, Harvard University Press, 1956, at 3 defines barriers to entry as a situation where entrants in a market cannot achieve post-entry the profit level incumbent firms were achieving pre-entry.

⁶⁴ G.J. STIGLER, *The Organization of Industry*, Homewood, Ill. : R. D. Irwin, 1968, at 67.

⁶⁵ I. LIANOS, cited at footnote 1, esp. 726 sq.

translate by reasoning in terms of discrimination.⁶⁶ Where the two economists differ is in the time element of the comparison. Bain compares the situation of entrants (French producers) *post entry* with that of local (German) producers *pre entry* and asks whether they would be on an equal footing in terms of profit opportunity. Stigler however compares the situation of French entrants *pre entry* with that of German producers *initially* (whenever that is) and asks whether the cost of starting a business is the same for both sets of operators. Translated into legal language, the two economists take a different view on what makes two situations similar. For Bain, actual competition between two economic operators puts them in a similar situation whereas for Stigler, the emphasis is on whether two operators have started in the same line of business (although possibly at different points in time). It is also interesting to note that none of the two definitions entail comparing the situation of the cross-border trader on his domestic and on the export market : whether it is more expensive to bring Cassis to the German market than to market it in France is not relevant. Both definitions thus differ from the “obstacle to trade” notion used in other freedoms, such as free provision of services, according to which it encompasses “any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State”.⁶⁷

In the Bainian notion of barriers to entry, anything that puts cross-border operators at a disadvantage compared to domestic producers potentially restricts imports. Even if it had not been criticised from a theoretical point of view,⁶⁸ the Bainian definition of barriers to entry would be of no help in the search for legal criteria, which could serve to narrow down the overbroad legal notion of obstacle to trade. The Stiglerian definition has the appeal that it is more restrictive. Thinking of the *Cassis* example, the question that would have had to be answered is whether the French *Cassis* producers had to face costs that German schnapps producers never had to incur. It is quite obvious that this was the case : compliance with German law was never costly for local producers, while, for the French producers, the cost – if this can be thought of as a cost – was impossibly high. It is not clear however if, for measures other than of the *Cassis*-type, where there is a clear asymmetry in compliance costs, the definition would be very helpful. Certainly, the Court would not be prepared to engage in full-fledged review of starting costs of similar businesses in different countries, at different point in time and, possibly on different scales of operation. Thus, there are just a few simple ideas to be taken out of economic notions of barriers to entry : i) barriers to entry can be defined in a narrower sense than any cost of entry on a market – in accordance with the wish

⁶⁶ SNELL, cited at footnote 1, offers a different presentation (at 438).

⁶⁷ Case C-281/06, *Jund* [2007] ECR I-12231 § 52 and case law cited.

⁶⁸ See J. SNELL, cited at footnote 1, at 438.

expressed by AG Poiares Maduro in his Opinion in *Alfa Vita*; ⁶⁹ ii) available definitions include a discrimination criterion – again in line with the criteria proposed in this opinion; iii) this element needs to be refined as the sort of cost discrimination Stigler has in mind is not practicable for adjudication purposes. It thus seems that the recourse to economics on barriers to entry adds little to the elaboration on discrimination and costs proposed by AG Poiares Maduro in *Alfa Vita*. ⁷⁰

B. — IS THERE ROOM FOR INSIGHTS FROM BEHAVIOURAL SCIENCES?

If economics does not seem all that helpful, could the Court possibly turn to other sciences for inspiration? What triggers the question is paragraph 57 of the *Commission v. Italy* judgment, where the Court reasoned that “Consumers, knowing that they are not permitted to use their motorcycle with a trailer specially designed for it, *have practically no interest in buying such a trailer*” ⁷¹. In other words, the effect of the measure on consumer (and, more generally, buyer) behaviour is decisive. As Ioanis Lianos points out, the Court, for the first time, turns to the demand-side, when it traditionally only had regard for the likely effect of national measures on suppliers. ⁷² This potentially opens a new field of investigation into the impact of national measures on consumer/buyer behaviour.

If it were only for easy cases, such as outright prohibition of the kind at stake in the Italian trailers case, there would not be much to investigate. As the Court observes, if the trailers (the ones designed specifically for mopeds) cannot be used at all, it is clear that consumers will not buy them. Common sense indeed suggests that this level of rationality can be expected of consumers, at least for goods that are purchased for their use-value and not as collection items or for investment purposes. The interesting question is how to analyse more difficult cases. The *Mickelsson and Roos* judgment, dealing with a restriction on use – rather than a prohibition – hints at this question. Significantly, the wording of paragraph 27 of that judgment differs slightly from the above quoted passage of *Commission v. Italy*. It reads : “[c]onsumers, knowing that the use permitted by such regulations is very limited, have only a *limited interest* in buying that product”. ⁷³ Swedish regulation on personal watercraft, as it stood when the Court ruled on the case (*i.e.* lacking a list of permitted waterways) was very restrictive, so that *Mickelsson and Roos* was still a relatively easy case. However, the wording makes one wonder about

⁶⁹ Cited at footnote 46, § 44

⁷⁰ Without referring to *Alfa Vita*, J. SNELL, cited at footnote 1, is also of the opinion that the notion of barriers to entry has nothing to add to the law of free movement of goods.

⁷¹ Emphasis added.

⁷² I. LIANOS, cited at footnote 1, at 733.

⁷³ Emphasis added.

hard cases. What makes a measure restricting use of goods so restrictive as to impact consumer behaviour? Some commentators have voiced concerns that the angle chosen by the Court may lead to a very subjective appraisal.⁷⁴ In connection with this question, AG Kokott, for her part, emphasised the uncertainty of a quantitative approach, under which measures causing a restriction in volume of trade would qualify as MEE. “For example”, she reasoned, “a prohibition on driving cross-country vehicles off-road in forests or speed limits on motorways would also constitute a measure having equivalent effect. In the case of these restrictions on use too, it could be argued that they possibly deter people from purchasing a cross-country vehicle or a particularly fast car because they could not use them as they wish and the restriction on use thus constitutes a potential hindrance for intra-Community trade”.⁷⁵ These examples raise the question of why people purchase goods and illustrate that it is a difficult question. Do people really buy SUVs for driving off the roads? A casual observation suggests that this may not be the main motivation for a majority of SUV owners. Do people buy fast cars to be able to drive fast or for status? Some sophisticated consumers may buy them for the sake of hearing their favourite music on the road without the interference of a roaring engine. Depending on the relative frequency of the different motives for buying a fast car, a given national measure, such as speed limit, will have a different impact on demand. Marketers are well aware of the complexity and multiplicity of buyers’ motivations and their science is all about categorising buyers and exploiting diversity.

It seems that, after *Commission v. Italy* and *Mickelsson and Roos*, the science of what makes buyers buy has become relevant to internal market law. The analysis of buying behaviour may need to be bifurcated between consumers and corporate buyers.⁷⁶ This would facilitate the use of scientific insights, as the study of individual and of corporate behaviour is habitually conducted with different tools within different disciplines – respectively consumer psychology and/or marketing on one hand, and business administration and/or strategy on the other.

It is entirely possible that the relevance of such studies of buyers’ behaviour in response to rules will go unnoticed or unexploited in the area of free movement of goods. Because this is new to lawyers, it will seem complex and exotic. Yet, parties litigating free movement of goods cases could find it useful to make arguments relating to buyers’ behaviour. The standard of proof in the first stage of the analysis has always been quite low and it is doubtful whether it would take very extensive market studies to adduce *prima facie* evidence that a national measure negatively impacts upon con-

⁷⁴ M. FALLON and D. MARTIN (cited at footnote 32 above).

⁷⁵ Opinion in *Mickelsson* (cited at footnote 4), § 45.

⁷⁶ In a recent Cartel decision concerning the market for detergents, the French competition authority distinguished in this manner between rational corporate buyers (such as hotels, restaurants, hospitals) and individual consumers, who are influenced by brands. Decision 11-D-17 (8 dec. 2011), § 374.

sumer behaviour towards a product. Should such arguments develop, this would create a new kind of demand for behavioural studies. The question would be to know what puts people off from buying, which is the opposite of what marketers ask. Of course, many of the elements which influence buying have to do with selling techniques and contextual elements, such as location of good in a store,⁷⁷ prices,⁷⁸ music,⁷⁹ smell,⁸⁰ touch,⁸¹ not all of which are influenced by regulation. It is noteworthy however that, to the extent public regulation does affect parameters of buyers' choice, rules relating to selling arrangements are most likely to be a category of rules of such nature as to impact on consumer choice. Recognising this would bring about an interesting new twist to *Keck's* posterity. But surely, any interested litigator will have to wait for the right case to argue that, on the basis of behavioural science, there are reasons to believe a national measure impacts demand for imported good in a negative manner. But who knows? Perhaps everything really comes to those who wait. After all, there was a time when the Commission wanted to make a point about product requirements and its patience was finally rewarded in the *Cassis de Dijon* case.⁸²

It is also entirely possible that, even if behavioural arguments were made in free movement of goods cases, the Court would find ways to dismiss them and keep behavioural evidence at bay. In a way, the wording of both *Commission v. Italy* and *Mickelsson and Roos* already offers an easy way out. In both cases, the Court reasons on the "interest" of consumers for an imported product.⁸³ Such language suggests that buyers are seen as rational agents, acting in their best interest. Yet, as everyone feels and as science now demonstrates, most decisions are not taken rationally.⁸⁴ Rationality may be

⁷⁷ J. LEHRER, *How We Decide*, Houghton Mifflin, 2009, Chap. 7 ; É. PÉLEGRIN-GRENEL, *Des souris dans un labyrinthe*, La Découverte, 2010.

⁷⁸ E.T. ANDERSON and D. SIMESTER, *Effects of \$9 price endings on retail sales : evidence from field experiments*. *Quantitative Marketing and Economics*, 2003 (1), 93-110 ; N. GUÉGUEN, *Psychologie du consommateur : pour mieux comprendre comment on vous influence*, (2009), chap. 1.

⁷⁹ C.M. REDKER and B. GIBSON, "Music as an Unconditioned Stimulus : Positive and Negative Effects of Country Music on Implicit Attitudes, Explicit Attitudes, and Brand Choice", *Journal of Applied Social Psychology*, vol. 39, Number 11, November 2009, 2689-2705.

⁸⁰ R. DOOLEY, *Brainfluence*, John Wiley & Sons, 2012, 36-40.

⁸¹ D. E. SMITH, J. A. GIER and F. N. WILLIS, *Interpersonal Touch and Compliance with a Marketing Request, Basic and Applied Social Psychology*, 1982, 3(1), 35-38.

⁸² For the tale of the *Cassis* case, see K. NICOLAIDIS, "Kir Forever, The Journey of a Political Scientist in the Landscape of Mutual Recognition", in L. AZOULAI and M. POIARES MADURO, *The Past and Future of EU Law : The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, 447-455.

⁸³ *Commission v. Italy*, cited at footnote 3, at § 57 and *Mickelsson and Roos*, cited at footnote 4, at 27.

⁸⁴ A seminal article which challenged the rationality assumption commonly made by economists is D. KAHNEMAN and A. TVERSKY, *Prospect theory : An analysis of decisions under risk*, *Econometrica* 1979, 47(2), 263-291. A very accessible read on this field of research is D. KAHNEMAN, *Thinking fast and slow*, Farrar, Straus and Giroux, 2011. See also J. LEHRER, cited at footnote 77.

a reasonable hypothesis in easy cases. Since it would be grossly irrational to buy a trailer that can only be towed by a moped if its use is prohibited, it is probably true that most people would not do it. In more complex cases, however, rationality is probably not a valid hypothesis and taking market access seriously would entail going beyond the rationality assumption and looking at how consumers really react to rules.

It should be noted that, within EU law, the broad question of whether courts should consider how people actually decide is not specific to free movement of goods. Indeed, in free movement of persons cases, the Court constantly makes suppositions about how workers, service providers and citizens decide and what rules are “liable to hamper or to render less attractive the exercise [...] of [their] fundamental freedoms”.⁸⁵ It generally seeks to avoid distinguishing between categories of persons who may be more or less sensitive to the effect of certain (dis-)incentives by making an intensive use of “may” and “might”. For example, ruling on a German measure which provided for full reimbursement of travel expenses of trainees only when the traineeship was carried out within Germany, the Court held that the rule “may deter trainee lawyers, particularly those with limited financial resources, from taking up a traineeship in another Member State, regardless of whether the decision to undergo such practical training is motivated generally, as the Land Nordrhein-Westfalen observes, by reasons relating to the trainee’s specialisation or by personal reasons, such as the wish to gain experience of another legal culture”.⁸⁶ According to the Court, it does not matter that the regulation only impacts upon one of many factors influencing the decision to exercise one’s freedom of movement. It is enough that it could conceivably influence the decision in some cases, without regard for the probable number or proportion of such cases.⁸⁷ For want of a better name, this type of reasoning could be called relevance-blurring. It may be used at will to set aside any scientific discourse on what should be relevant or determinative, just by giving precedence to another relevant fact and without an enquiry into which fact (the one put forward by behavioural science or the one picked by the plaintiff, such as cost in the above example) is generally more relevant than the other or into how various relevant considerations relate to one another. This technique is an expression of the Court’s characteristic choice between two types of errors. It would always rather strike down a measure that does not really hinder free movement than risk letting an actual obstacle stand. The type of reasoning just

⁸⁵ Case C-19/92, *Kraus*, [1993] ECR I-1663, § 32.

⁸⁶ Case C-109/04, *Kranemann* [2005] ECR I-2421, § 29, emphasis added. This example is borrowed from M. FALLON and D. MARTIN, cited at footnote 32. The authors, at 166, find the reasoning of the AG (which is quite closely followed by the Court) particularly unconvincing.

⁸⁷ This line of reasoning does not seem limited to discriminatory measures. See e.g. *Kraus*, cited at footnote 85 about the possibly dissuasive value of a non-discriminatory rule imposing a payment of DM 130 for the transcription of a degree obtained abroad.

described is tailored to this preference for false positives (or type I errors) over false negative (or type II errors). It is deeply enshrined in the case law and, at the same time, presents a formidable obstacle for more refined analysis of individual behaviour, whether that of consumers or of citizens more generally.

Given all the complexity of real decision-making processes and the many techniques the Court has developed to avoid letting real-life complexity into the courtroom, there is arguably little scope for behavioural arguments to develop in the area of free movement of goods as in other freedoms. In the field of free movement of goods, such arguments would only become relevant in “hard cases”, where the question is whether the national measure, which does not make demand disappear, restricts it in a significant manner. Yet, however restricted the scope for fact-based assessment of whether and how a measure impacts on consumer demand may be in practice, there should, in principle, be some room for it. If market access is to be taken seriously, so should consumer behaviour since, in the own words of the Court in *Commission v. Italy* and in *Mickelsson and Roos*, one depends on the other.

Conclusion

Without an analytical framework to go with it, market access is a useless addition to the law of free movement of goods.⁸⁸ At present, such an analytical framework is largely missing and there is little hope that economics could be of help in developing one, at least if it were based on the notion of barriers to entry. A real novelty would come if lawyers looked to behavioural sciences, which are increasingly popular with legislators,⁸⁹ but not yet with courts.

In its rulings in *Commisison v. Italy* and *Mickelsson and Roos*, the Court, for the first time in the area of free movement of goods, reasons in terms of consumer behaviour. As these were straightforward cases, the Court did not need to develop a refined analysis of how buyers react to a legal rule. Only if the Court is faced with cases where the impact of a national measure on buyers’ incentives is less clear-cut will it need to go beyond the language of “consumers’ interest”, which it used in both *Commission v. Italy* and *Mickelsson and Roos*. If the Court shows a readiness to hear more subtle arguments about the impact of rules on consumers or corporate buyers, something will really

⁸⁸ For all the reasons put forward by J. SNELL, cited at footnote 1.

⁸⁹ C. SUNSTEIN and R. THALER’s book, *Nudge: Improving Decisions about Health, Wealth and Happiness*, Caravan, 2008, is not only influential in the US. See *European Journal of Risk Regulation*, 2012, 3(1) where a symposium on Nudge is published (with UK and EU examples). See also A. ALEMANNNO, “Nudging Europe”, *European Voice*, 16 May 2012 and reply by “Behavioural insights for policymaking at the European Commission”. P. TESTORI COGGI, *European Voice*, 14 June 2012.

change in the law of free movement and a more realistic look at how economic actors and citizens decide would also concern the other fundamental freedoms.

It seems very unlikely that the Court will want to engage – or request national courts to engage – in actual case-by-case fact finding about the effects of particular rules on behaviour. This would be far too complex. Indeed, existing practice shows that the Court has developed an array of effective techniques to prevent free movement cases from turning on issues of fact. This does not necessarily mean that behavioural science could not contribute in another manner to appraisal of buying behaviour. If the issue of how people react to rules attracts enough attention from behavioural sciences, a possible development could be that, in time, different categories of consumption-inducing or consumption-chilling effects emerge. Courts, as well as policy makers, could then rely on these categories to anticipate how operators and consumers would be likely to react to national rules and, based on such assessment, decide if they hinder market access. This could be a way to take market access seriously in a reasonably abstract manner.